

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> OWCP accepted that on April 9, 2002 appellant, then a 45-year-old clerk, sustained a left knee injury when she tripped on a rubber mat and fell. Appellant filed a schedule award claim. OWCP found a conflict in medical opinion arose between Dr. David Weiss, an osteopath, and Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and medical adviser. It referred her to a Dr. Thomas O'Dowd for an impartial medical examination.<sup>3</sup>

In an April 22, 2008 report, Dr. O'Dowd disagreed with the findings of Dr. Weiss and Dr. Berman. He concluded that appellant did not sustain any left lower extremity impairment as a result of the April 9, 2002 work-related injury.<sup>4</sup> Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, agreed with Dr. O'Dowd's finding.<sup>5</sup> In a decision dated October 23, 2008, OWCP denied appellant's schedule award claim based on insufficient medical evidence.

Appellant submitted an appeal to the Board.<sup>6</sup> By decision dated August 10, 2010, the Board found that a conflict in medical opinion still existed regarding whether she sustained permanent impairment. It remanded the case to Dr. O'Dowd for supplemental report clarifying the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6<sup>th</sup> ed. 2008)

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<sup>2</sup> Docket No. 09-2169 (issued August 10, 2010).

<sup>3</sup> In an August 2, 2004 report, Dr. Weiss concluded that appellant had 11 percent permanent impairment of the left lower extremity with maximum medical improvement on August 2, 2004. In a December 4, 2007 report, Dr. Berman determined that appellant had six percent permanent impairment of the left lower extremity with maximum medical improvement on August 2, 2004.

<sup>4</sup> In the April 22, 2008 report, Dr. O'Dowd found that the medical evidence, specifically a May 2002 magnetic resonance imaging (MRI) scan report, did not support that appellant sustained left knee internal derangement but demonstrated that she sustained a left knee contusion leading to bursitis, which had since resolved. He also found that appellant suffered from preexisting left knee degenerative joint disease, which was not employment related. Dr. O'Dowd explained that if she suffered from left knee internal derangement then he agreed with Dr. Berman's finding that she had six percent left lower extremity impairment. However, since the medical evidence did not support a diagnosis of internal derangement of the left knee he found that appellant did not suffer any permanent impairment as a result of the April 9, 2002 work-related injury.

<sup>5</sup> In a September 15, 2008 report, Dr. Slutsky reviewed Dr. O'Dowd's report and agreed that appellant suffered from preexisting left knee degenerative joint disease agreed and noted that if this condition was accepted then an x-ray needed to be taken according to the A.M.A., *Guides*. He also agreed with Dr. O'Dowd's determination that appellant's accepted left knee condition had long resolved and that appellant did not suffer from any other left knee condition related to her accepted injury. Therefore, unless OWCP accepted appellant's claim for left knee degenerative joint disease she did not have a left knee permanent impairment as a result of the April 9, 2002 work-related injury. Dr. Slutsky noted the date of maximum medical improvement as April 22, 2008.

<sup>6</sup> Following the October 23, 2008 denial decision, appellant, through counsel, requested a hearing that was held on March 17, 2009. In a May 21, 2009 decision, OWCP's hearing representative affirmed the December 23, 2008 denial decision finding that the medical evidence failed to establish that appellant sustained a work-related permanent impairment and was entitled to a schedule award.

(A.M.A., *Guides*).<sup>7</sup> The facts of the claim, as set forth in the Board's prior decision, are incorporated herein by reference.

In a September 20, 2010 supplemental report, Dr. O'Dowd noted that according to the statement of accepted facts, OWCP accepted left knee internal derangement. He explained that this condition was a very nonspecific diagnosis that was only used until a proper diagnosis was made. Dr. O'Dowd stated that the diagnosis of "internal derangement" would be a contusion of the knee and preexisting degenerative joint disease. He reported that appellant's left knee contusion had resolved and was not the cause of any permanent disability or impairment. Dr. O'Dowd also explained that her permanent disability was related to her chronic arthritis, which was not work related. He concluded that appellant did not sustain any permanent impairment as a result of her work-related injury.

In a December 16, 2010 report, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon, reviewed the statement of accepted facts and appellant's history, including Dr. O'Dowd's report. He noted that Dr. O'Dowd did not reference the sixth edition of the A.M.A., *Guides*, but did not need to utilize the A.M.A., *Guides* as he found that appellant's injury had resolved and she did not sustain any permanent impairment as a result of her work-related injury. Dr. Magliato agreed with Dr. O'Dowd's finding that appellant had preexisting arthritis unrelated to her job. Utilizing the sixth edition of the A.M.A., *Guides*, he concluded that under the *Knee Regional Diagnostic Grid*, Table 16-3, page 509, appellant would be in a class 0. Dr. Magliato stated that April 22, 2008 was the date of appellant's maximum medical improvement.

In a decision dated February 9, 2011, OWCP modified the acceptance of appellant's claim to left knee contusion. It denied her claim for a schedule award as the medical evidence was insufficient to establish that she sustained permanent impairment due to her accepted work injury.

On February 16, 2011 appellant, through counsel, submitted a request for an oral hearing, which was held on June 21, 2011. Counsel contended that Dr. O'Dowd's September 20, 2010 supplemental report did not address any rating for left knee contusion and stated that Dr. Weiss recommended a two percent permanent impairment for the left lower extremity because of her left knee contusion.

In June 20 and August 24, 2011 letters, counsel reiterated that Dr. Weiss determined that appellant had 2 percent permanent impairment of the left lower extremity for left knee contusion and 26 percent for preexisting left knee osteoarthritis. According to the sixth edition of the A.M.A., *Guides*, these two ratings could not be combined but it was Dr. Weiss's opinion that the 26 percent impairment for arthritis adequately characterized appellant's left lower extremity impairment.

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<sup>7</sup> The Board also found that the evidence of record established that OWCP properly selected Dr. O'Dowd to serve as the impartial medical examiner as the record contained a memorandum advising that a Dr. Joseph Harhay was not selected because he was unable to schedule an appointment in a reasonable amount of time.

Dr. Weiss resubmitted his August 2, 2004 report updated to June 17, 2011, to reflect the sixth edition of the A.M.A., *Guides*. The findings from 2004 noted a marked right lower extremity limp and tenderness over the medial joint line and medial joint space. Patellofemoral compression produced crepitus and pain within the medial and lateral joint compartments. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Weiss concluded that appellant had 2 percent permanent impairment for left knee contusion<sup>8</sup> and 26 percent permanent impairment for left primary knee joint arthritis.<sup>9</sup> He explained that the A.M.A., *Guides* did not allow for more than one diagnosis for the left knee and provided that the diagnosis that demonstrated the most clinically accurate impairment should be used. Dr. Weiss opined that the left knee primary knee joint arthritis adequately characterized the impairment and thus, appellant had 26 percent left lower extremity impairment with maximum medical improvement on August 2, 2004.

By decision dated September 2, 2011, OWCP's hearing representative affirmed the February 9, 2011 decision denying appellant's claim for a schedule award. It determined that Dr. O'Dowd's September 20, 2010 supplemental report constituted the weight of the medical evidence and established that appellant had no permanent impairment to her left lower extremity as a result of the accepted work injury.

On September 20, 2011 appellant submitted a request for reconsideration and resubmitted Dr. Weiss' updated August 2, 2004 report.

By decision dated January 31, 2012, OWCP denied modification of the February 9, 2011 decision denying appellant's schedule award claim.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>10</sup> and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (6<sup>th</sup> ed. 2009), has been adopted by OWCP for evaluating schedule losses and

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<sup>8</sup> Dr. Weiss reported that appellant fell under class 1 for left knee contusion and had a default value of one percent and diagnosed condition (CDX) of 1. Utilizing the grade modifiers for Functional History (GMFH) on Table 16-6, page 516, grade modifier 2, Physical Examination (GMPE) on Table 16-7, page 517, grade modifier 1 and Clinical Studies (GMCS) on Table 16-8, page 519, grade modifier 1, he determined that an adjustment of +1 was necessary. As applied to the *Knee Regional Grid*, Table 16-3, page 509, appellant's grade was increased from one to two percent left lower extremity impairment.

<sup>9</sup> Dr. Weiss determined that appellant fell under class 3 for primary knee joint arthritis and had a default value of 30 percent and diagnosis CDX of 3. Utilizing the grade modifiers for functional history on Table 16-6, page 516, grade modifier 2, and physical examination on Table 16-7, page 517, grade modifier 1, he determined that an adjustment of -3 was necessary. As applied to the *Knee Regional Grid*, Table 16-3, page 509, appellant's grade was decreased to 26 percent left lower extremity impairment.

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

the Board has concurred in such adoption.<sup>11</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>12</sup>

The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.<sup>13</sup> The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.<sup>14</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>15</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>16</sup> The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.<sup>17</sup>

If there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>18</sup> In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>19</sup>

### ANALYSIS

OWCP accepted that on April 9, 2002 appellant sustained a left knee contusion when she tripped on a rubber mat and fell. She requested a schedule award. OWCP found a conflict in

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<sup>11</sup> *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>12</sup> FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>13</sup> *Veronica Williams*, 56 ECAB 367 (2005); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>14</sup> *Michael S. Mina*, 57 ECAB 379 (2006).

<sup>15</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

<sup>16</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>17</sup> *Patricia J. Bolleter*, 40 ECAB 373 (1988).

<sup>18</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>19</sup> *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

medical opinion between appellant's physician, Dr. Weiss, and Dr. Berman, an OWCP medical adviser. It referred appellant to Dr. O'Dowd, as an impartial medical examiner, to resolve the conflict in medical opinion as to the extent and degree of any permanent impairment resulting from the employment injury.

In April 22, 2008 and September 20, 2010 reports, Dr. O'Dowd reviewed the statement of accepted facts and noted his diagnoses of left knee contusion and preexisting degenerative joint disease. He reported that according to a May 2002 MRI scan, appellant's left knee contusion had resolved and was not the cause of any permanent disability or impairment. Dr. O'Dowd also explained that appellant's permanent disability was related to her chronic arthritis, which was not work related. Therefore, he concluded that she did not sustain any permanent impairment as a result of her April 2002 work-related injury. The Board finds that Dr. O'Dowd's opinion is sufficiently well rationalized and based upon a proper factual and medical background. Dr. O'Dowd fully discussed the history of injury and related his examination findings in support of his opinion. He concluded that appellant did not have any permanent impairment as a result of her accepted conditions. As noted, the opinion of the impartial medical specialist is given special weight if it is sufficiently well rationalized and based upon a proper factual background.<sup>20</sup> Dr. O'Dowd thoroughly reviewed appellant's history and provided findings on examination. He sufficiently explained how his findings supported his conclusion that appellant's left knee condition had resolved and that any permanent disability she may have was a result of her arthritis condition and not her accepted conditions. The Board finds that Dr. O'Dowd's report represents the special weight of the medical evidence.

OWCP's medical adviser reviewed Dr. O'Dowd's report and agreed with the findings that appellant had no permanent impairment as a result of her April 9, 2002 employment injury because the accepted conditions had resolved. The Board finds that OWCP properly determined that the medical evidence did not establish that appellant had any permanent impairment causally related to her left knee condition and denied her schedule award claim.

Following OWCP's decision, appellant submitted a June 17, 2011 report from Dr. Weiss, who provided a copy of his 2004 report updated to reflect the sixth edition of the A.M.A., *Guides*. Dr. Weiss concluded that she had a 26 percent permanent impairment of the left lower extremity due to her left knee arthritis. He determined that appellant fell under class 3 of the *Knee Regional Grid*, Table 16-3, page 511 with default value of 30 percent and utilized grade modifiers to determine that appellant had 26 percent impairment. The Board notes, however, that she has to establish impairment to a scheduled member caused by the accepted condition before an impairment due to a preexisting condition can be assessed.<sup>21</sup> Moreover, the report is of diminished probative value as it was based on a 6-year-old physical examination, not a current physical evaluation. Dr. Weiss' report, therefore, is of limited probative value and is insufficient to overcome the special weight given to Dr. O'Dowd's impartial medical opinion or to create a new conflict.

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<sup>20</sup> *Supra* note 19.

<sup>21</sup> *R.B.*, Docket No. 11-231 (issued August 10, 2011); *see generally* *Thomas P. Lavin*, 57 ECAB 353 (2006).

On appeal, appellant contends that Dr. O'Dowd's opinion should not constitute the weight of medical evidence as he failed to clarify to what extent appellant suffered an aggravation of her arthritic condition of her left knee or why he diagnosed left knee contusion instead of left knee internal derangement. She contended that he should have considered her preexisting condition in his overall impairment rating. The Board finds that Dr. O'Dowd thoroughly reviewed appellant's history, conducted an examination, and properly concluded, based on his findings that her left knee condition had resolved. Dr. O'Dowd found that appellant's arthritic condition was not related to her April 9, 2002 employment injury. A schedule award can be paid for preexisting conditions if the accepted conditions contribute to permanent impairment. Appellant has only established a contusion as the accepted condition. There has been no evidence to establish the arthritis of the knee causally related to the employment incident.<sup>22</sup>

The Board finds that the medical evidence does not establish that appellant has permanent impairment causally related to her accepted left knee injury. Consequently, appellant has failed to establish that she is entitled to a schedule award.

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant has not established that she sustained any permanent impairment warranting a schedule award.

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<sup>22</sup> See *K.H.*, Docket No. 09-341 (issued December 30, 2009); *R.B.*, Docket No. 12-518 (issued November 6, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board